

# ARKANSAS SUPREME COURT

No. CR 06-849

NOT DESIGNATED FOR PUBLICATION

BRIAN CROSSNO  
Petitioner

v.

STATE OF ARKANSAS  
Respondent

Opinion Delivered      December 14, 2006

MOTION FOR RULE ON CLERK  
[CIRCUIT COURT OF JOHNSON  
COUNTY, CR 2001-79, HON. DENNIS  
SUTTERFIELD, JUDGE]

MOTION FOR RULE ON CLERK  
TREATED AS MOTION FOR  
BELATED APPEAL AND GRANTED  
IN PART AND DENIED IN PART.

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## PER CURIAM

In 2002, petitioner Brian Crossno entered a plea of guilty to delivery and manufacture of a controlled substance and was sentenced to ninety-six months' imprisonment. Imposition of the sentence was suspended on an additional forty-eight months' imprisonment. An amended judgment was entered in 2005, and a retained attorney representing petitioner filed a motion in the circuit court seeking to set aside that judgment. The motion was denied, and a *nunc pro tunc* order that was essentially the same as the amended judgment was entered at the same time.

Petitioner, acting *pro se*, filed a notice of appeal, but not within the required thirty-day period in accordance with Ark. R. App. P.–Civ. 4 (a). At the same time, petitioner filed a motion for reconsideration. On April 21, 2006, the circuit court denied the motion for reconsideration, and later appointed the public defender commission to represent petitioner on appeal of that order. The commission moved to set aside the order of appointment and that motion was denied. No notice of

appeal was filed as to the April 21, 2006, order.

Attorney James Dunham, Managing Public Defender representing petitioner, then filed a motion for rule on clerk requesting this court to direct our clerk to accept the record and docket the appeal, to relieve him as counsel, and to direct trial counsel to enter an appearance on petitioner's behalf. We remanded for findings of fact concerning whether or not the retained attorney representing petitioner on the motion to set aside judgment, Herschel W. Cleveland, had been instructed by petitioner to appeal within the thirty-day period to file a notice of appeal. *Crossno v. State*, CR 06-849 (Ark. Sept. 14, 2006) (*per curiam*). The circuit court has now returned those findings and provided the transcript of its hearing on the matter.

The circuit court found that Mr. Cleveland had not been instructed to file an appeal of the adverse ruling on the motion to set aside the judgment within the required time, and that petitioner had thereby waived his right to appeal that order. From the transcript it is clear that petitioner elected to rely upon his mother, who had retained Mr. Cleveland on his behalf, to communicate with the attorney. Petitioner testified that he did not personally instruct Mr. Cleveland to file an appeal. Petitioner instead discussed his desire to appeal with his mother and did not pursue the matter further after learning that an appeal would cost \$3,500. Petitioner then filed his own notice of appeal *pro se*. While petitioner's mother did not attend the hearing, petitioner proffered testimony from her that she had advised Mr. Cleveland that petitioner wished to appeal, but was told that the cost of the appeal would be \$3, 500. However, Mr. Cleveland testified that he had not been instructed to bring an appeal by either petitioner or his mother.

Mr. Cleveland was not obligated to perfect an appeal of the order denying the motion to set aside the judgment. We deny both that part of Mr. Dunham's motion requesting this court to relieve

him as counsel and that part requiring Mr. Cleveland to pursue the appeal. However, we grant petitioner's request to pursue a belated appeal under Ark. R. App. P.--Crim. 2 (e).

Relief from failure to perfect an appeal is provided as part of the appellate procedure granting the right to an appeal. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004). Where it is plain from the motion, affidavits, and record that relief is proper under the Ark. R. App. P.--Crim. 2(e), based upon error or good reason, this court will grant a belated appeal. *Id.* When a criminal defendant requests a belated appeal, good reason is established where the defendant is not at fault, and his or her attorney has failed to file a timely notice of appeal. *Williams v. State*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (June 15, 2006) (*per curiam*).

Here, Mr. Dunham did not timely file a notice of appeal from the denial of petitioner's motion for reconsideration, although the public defender commission was appointed to represent petitioner on appeal five days after the order was entered. It is clear from the record before us that petitioner was not at fault and that his attorney failed to file a timely notice of appeal. Where, as here, there is attorney error, a copy of the opinion will be forwarded to the Committee on Professional Conduct.

We direct our clerk that the appeal from the denial of the motion for reconsideration will proceed. The partial record will now be lodged. Mr. Dunham is directed to file a petition for writ of *certiorari* within thirty days to call up any additional portion of the record that may be necessary for an appeal to this court and a briefing schedule will then be set.

Motion for rule on clerk treated as motion for belated appeal granted in part and denied in part.